



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

May 20, 2003

Mr. Rodolfo Martinez  
Law Office of Martinez, Martinez & Associates  
101 North 10<sup>th</sup> Street  
Edinburg, Texas 78539

OR2003-3368

Dear Mr. Martinez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181357.

The Pharr-San Juan-Alamo Consolidated Independent School District (the "district") received a request for copies of certain competitive sealed bid proposals regarding Phase III of "Project Access." You claim that the requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. We also received comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit comments explaining why information should or should not be released). We have reviewed the submitted information and have considered the issues raised by the district and the requestor.

Initially, we address the district's obligations section 552.301 of the Government Code with respect to the request for information. Subsections 552.301(a) and (b) provide:

- (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.
- (b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

We further note that section 552.301(e) requires that the government body receiving the records request must provide this office with a copy of the request for information within 15 business days of the government body's receipt of the record request. *See* Gov't Code § 552.301(e)(1)(B). Additionally, Section 552.305(d) of the Government Code requires the governmental body to make a good faith effort to notify a person whose proprietary interests may be implicated by a request for information where the information may be excepted from disclosure. The required notice must be in writing and sent within ten business days of the governmental body's receipt of the request. It must include a copy of the written request for information and a statement in the form prescribed by the attorney general that the person may submit to the attorney general within ten days of his receiving the notice reasons why the information in question should be withheld and explanations in support thereof.

In your brief, you state that the district received the request for information on February 28, 2003. You should have submitted your request for an attorney general opinion no later than March 14, 2003. However, it appears that you did not submit your request for a ruling until after March 14, 2003. Further, you did not submit a copy of the request for information. Therefore, we find that you did not comply with section 552.301 in seeking a ruling from this office. Consequently, the requested information is presumed to be public information. Gov't Code § 552.302.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, when some other source of law makes the information confidential or the information impacts the interests of a third party, a compelling interest exists. Open Records Decision No. 150 at 2 (1977). You assert sections 552.104, and 552.110 of the Government Code. Section 552.104 is a discretionary exception under the Public Information Act and does not constitute a compelling reason sufficient to overcome the presumption of openness. *See* Open Records Decision Nos. 592 (1991) (governmental body may waive section 552.104), 522 (1989) (discretionary exceptions in general). Therefore, we do not consider your section 552.104 claim. Section 552.110, however, does constitute a compelling reason to overcome the presumption of openness and thus, we will consider whether section 552.110 is applicable in this instance.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The

governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

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<sup>1</sup> The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Although you raise section 552.110, you make no arguments in support of this exception. Furthermore, no interested third party has submitted to this office its reasons explaining why the district should not release the information. *See* Gov't Code § 552.301(b)(d)(2)(B). Therefore, we have no basis to conclude that the submitted information is excepted from disclosure under section 552.110 of the Government Code. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). The submitted information must therefore be released to the requestor with the following exception.

The submitted information contains e-mail addresses subject to section 552.137 of the Government Code. Specifically, section 552.137 states the following:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. You do not inform us that any of the members of the public have affirmatively consented to the release of their e-mail address contained in the submitted materials. Therefore, the district must withhold the e-mail addresses of the members of the public, which we have marked, under section 552.137.

In summary, the district must release the information you have submitted as responsive to the request, but must redact the e-mail addresses we have marked under section 552.137 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Robert F. Maier  
Assistant Attorney General  
Open Records Division

RFM/seg

Ref: ID# 181357

Enc. Submitted documents

c: Ms. Stephanie O'Rourke  
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(w/o enclosures)